

Sanctions for misconduct in judicial office

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Editorial

Judges in Ireland can be removed from office only after a resolution to that effect is passed by both Houses of the Oireachtas. The removal procedure has never been used in Ireland and, in fact, is used relatively rarely anywhere else. In the Irish context, the absence of any mechanism other than impeachment means that there is currently no means by which matters of judicial misconduct which fall short of 'stated misbehaviour' may be dealt with except in the context of District Court judges.

The *Judicial Council Bill*, currently on the Government's legislative programme, proposes to remedy this. The stated purpose of the Bill is to provide effective remedies for complaints about judicial misbehaviour and to provide for lay participation in the investigation of complaints.

This *Spotlight* examines the means through which judicial misconduct is dealt with in Ireland. For comparative purposes, the means by which judicial misconduct is addressed in a range of other jurisdictions is also discussed.

Introduction

The term ‘impeachment’ refers to the procedure whereby certain office-holders are removed from office. This *Spotlight* looks at how this process works in Ireland and selected other jurisdictions in the specific context of the judiciary.

The procedure has never been used in Ireland and, in fact, is used relatively rarely anywhere else. In the Irish context, the absence of any mechanism other than removal from office means that matters of judicial misconduct may only be resolved by resignation or impeachment.

There is no constitutional or statutory means by which conduct falling short of what is envisaged by Bunreacht na hÉireann may be dealt with, except in the case of District Court judges.

The *Judicial Council Bill*, when published, is expected to provide some form of means of closing this gap. The purpose of this *Spotlight* is to set out the current constitutional and legal position on removal from judicial office together with a brief overview of how matters of judicial misconduct and discipline are dealt with in other countries.

For comparative purposes, the equivalent processes in a number of other common law jurisdictions are outlined. The legal systems in Scotland and South Africa are mixed legal systems and this *Spotlight* provides a brief outline of the means by which those jurisdictions deal with judicial misconduct or incapacity.¹

Judges in civil law jurisdictions in Europe are effectively civil servants and as such, are ultimately answerable to the head of

¹ The common law legal system is used in Ireland and most of the UK. On the Continent, variants of the civil law system are used. Some jurisdictions have legal systems which incorporate two or more traditions. These might include aspects of civil law, common law, religion-based law, and local customs. For the purposes of this paper, two mixed systems were chosen, namely Scotland and South Africa.

the Government department responsible for the administration of justice in their respective countries. For this reason, no useful comparison can be made between them and their equivalents in Ireland.

The *Spotlight* is divided into the following main sections:

- Removal from office of judges in Ireland;
- Removal from judicial office in other common law jurisdictions;
- Mixed jurisdictions.

The section on Ireland covers the separation of powers, tenure, removing a judge from office, the “*Sheedy*” and “*Curtin*” affairs and current proposals for reform.

The common law jurisdictions examined are England and Wales, Canada, New Zealand and the United States. In addition, Scotland and South Africa, both of which are jurisdictions with mixed systems are discussed.

Most countries have procedures to examine and deal with the conduct of judges which falls below the standard for removal from office.

Removal from office of judges in Ireland

In the ordinary course of events, anyone appointed to judicial office in Ireland remains in office until they reach the age of retirement relevant to their office unless they decide to retire at an earlier age.

Retirement age for members of the judiciary is fixed by statute at 70 years of age for judges of the Superior Courts and the Circuit Court and at 65 years for judges of the District Court.²

² In the case of judges of the Supreme and High Courts, the age of retirement is set out in s. 47 of the *Courts and Courts Officers Act 1995* and at 72 in the case of judges who had held office prior to the commencement of s. 47. Section 18 of the *Court of Appeal Act 2014* amends s. 47 by the insertion of a new

Separation of Powers

Judicial independence is a requirement of Bunreacht na hÉireann which states, in Article 34.2, that:

'All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law.'

This independence is an integral component of the doctrine of the Separation of Powers which is intended to provide an optimal environment for the functioning of the State. It does this by providing each organ of State with its own sphere within which to fulfil its functions with as little interference as possible from the other organs.

In Ireland, the Separation of Powers operates in such a way as to provide for a system of checks and balances. These include:

- Article 15 provides that sole legislative power is vested in the Oireachtas and no other body is empowered to make law for the State;³
- Article 34 vests the High Court with '*full original jurisdiction in and power to determine all matters and questions whether of law or fact*'. This provides the High Court with the power to strike down legislation that it deems to be unconstitutional;⁴
- Under Article 26 the President may refer a Bill to the Supreme Court for a determination as to its constitutionality.

s. 47A which sets the age of retirement for judges of the Court of Appeal in the same terms. The issue of retirement is provided for by s. 40 of the *Courts of Justice Act 1924* and by s. 30(1) of the *Courts (Supplemental Provisions) Act 1961* in the respective cases of Circuit Court and District Court judges.

³ With the exception under Article 29 of Bunreacht na hÉireann of '*laws enacted, acts done or measures adopted*' which are necessitated by obligations arising from Ireland's membership of the European Union.

⁴ Provided the legislation in question had not survived a challenge following a referral to the Supreme Court under Article 26.

Each organ of State, in carrying out its constitutional functions is protected to a large degree from the influence of any of the others. In the case of the Houses of the Oireachtas, for example, Article 15.10 of Bunreacht na hÉireann provides that:

'Each House shall make its own rules and standing orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties.'

Article 15.12 confers absolute privilege on the official reports and publications of the Houses of the Oireachtas.⁵ This privilege also applies to utterances made in either House. Further, Members of the Houses of the Oireachtas are privileged from arrest when going to, coming from, or within the precincts of the Houses.⁶

The independence of the judiciary is also protected by privilege in respect of anything said in the course of their duties. The integrity of the justice system is safeguarded by the availability of penalties for contempt of court and, although many areas of civil law are now being dealt with by quasi-judicial bodies, only a constitutionally recognised court is

⁵ Article 15.12 states that: '*All official reports and publications of the Oireachtas or of either House thereof and utterances made in either House shall be privileged.*'

⁶ The privilege from arrest contained in Article 15.13 applies '*except in the case of treason as defined in this Constitution, felony or breach of the peace*'. Section 3(1) of the *Criminal Law Act 1997* abolished the distinction in Irish law between felonies and misdemeanours. A person suspected of a felony could be arrested without warrant. Since the abolition of the distinction between the two types of offence, Irish law now provides for a category known as '*arrestable offences*'. These are offences which carry a potential custodial sentence of 5 years or more.

permitted to dispose of criminal cases.⁷ Judges are constitutionally prohibited under Article 35.3, from holding any position of emolument during their tenure and their remuneration may only be reduced, during their continuance in office, in accordance with Article 35.5 which was amended following a referendum in 2011.

Tenure

The Irish courts are hierarchical in nature with the Superior Courts expressly provided for by Bunreacht na hÉireann.⁸ The issue of tenure is expressly set out in the text of the Constitution in the case of judges of the Superior Courts in Article 35.4.1 which provides that:

'A judge of the Supreme Court, the Court of Appeal or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal.'

The guarantee, set out in Article 35.4.1 specifies only judges of the Supreme Court, Court of Appeal and the High Court and judges of the lower courts are not mentioned in it.

A referendum held in October 2013 on the 33rd Amendment to Bunreacht na hÉireann was carried with the result that a new Court of Appeal will be established in accordance with the [Court of Appeal Act 2014](#).⁹ The Court of Appeal will rank higher than all other courts with the exception of the Supreme Court. The 33rd Amendment has brought about a

number of consequential amendments to the provisions of Bunreacht na hÉireann which had previously referred to the Supreme Court and the High Court. In the context of removal from office, the effect of the Amendment is that judges of the Court of Appeal are expressly included in the protection granted by Article 35.4.1.

Article 38.3.1 of Bunreacht na hÉireann provides for the establishment by law of special courts for the trial of certain offences where it is determined that the ordinary courts are not capable of securing the effective administration of justice and the preservation of public peace and order. Accordingly, the Special Criminal Court was established by the [Offences Against the State Act 1939](#). Although the 1939 Act sets out a range of people who could sit as judges in the Special Criminal Court, the practice for many years has been that judges are drawn from a panel comprising judges from the High, Circuit, and District Courts.

The Circuit and District Courts are courts of local and limited jurisdiction which were originally established by the [Courts of Justice Act 1924](#) ("the 1924 Act").¹⁰

The judges of these courts have been brought within the scope of the protection of Article 35.4.1 by legislation. In the case of judges of the Circuit Court the relevant provision is s.39 of the [Courts of Justice Act 1924](#) which provides that judges of the Circuit Court enjoy the same tenure as judges of the High Court and Supreme Court. The equivalent provision in respect of judges of the District Court is s. 20 of the [Courts of Justice \(District Court\) Act 1946](#).

This means that potentially, the procedure for removing these judges could be set out in statute and would,

⁷ For example, employment law disputes and matters pertaining to immigration and asylum are dealt with by various statutory bodies.

⁸ The system of courts provided for by and in Bunreacht na hÉireann is, essentially, a replication of the system of courts that had been in existence under the Constitution of the Irish Free State.

⁹ The [Court of Appeal Act 2014](#) was signed by the President on 20th July 2014 but will not become operative until commenced by order(s) of the Minister for Justice and Equality.

¹⁰ After the adoption of Bunreacht na hÉireann, new legislation was enacted in order to re-establish the courts under the new Constitution. This was done in two statutes, namely the [Courts \(Establishment and Constitution\) Act 1961](#) and the [Courts \(Supplemental Provisions\) Act 1961](#) both of which have been amended on numerous occasions.

consequently, be of capable of being amended by the legislature. This point was made by Finlay, CJ in *Magee v Culligan* where he stated that:¹¹

'The Constitution does not contain any guarantee to judges of any of the courts, other than the Supreme Court or the High Court, of the particular method by which they can be removed from office.'

Hogan and Whyte (2003) warn, however, that *'...any such statute would risk invalidation if its operation tended to impinge on the independence of the judiciary'*.¹²

Special provisions governing judges of the District Court

There are a number of statutory provisions which provide a mechanism for enquiring into the health or conduct of a judge of the District Court, which are described by Hogan and White as being less 'drastic' than a call for removal from office.¹³ There are no equivalent provisions for judges of any other court.

Under s. 21 of the *Courts of Justice (District Court) Act 1946* the Minister for Justice may request the Chief Justice to appoint a judge of the Supreme Court or the High Court to investigate the state of health or the conduct of a District Court Judge and provide the Minister with a report on the matter. This has happened on a small number of occasions, the most well-known instance occurring in 2000 when Judge Donnchadh Ó Buachalla was investigated in relation to the licensing of Jack White's Inn, a premises owned by Mrs Catherine Nevin, an acquaintance of the Judge. The investigation also inquired into the judge's handling of a number of complaints against several members of An Garda Síochána by Mrs Nevin. The report of the Inquiry concluded that Judge Ó Buachalla had not acted improperly but that he had made a number of errors of

¹¹ [1992] IR 233

¹² Kelly, J.M. (2003) *The Irish Constitution* (4th Ed) Hogan, G. and Whyte, G. (eds) Tottel, Dublin.

¹³ *Ibid* at p. 1011

judgement by not recusing himself from dealing with matters involving Mrs Nevin.¹⁴

Section 10(4) of the *Courts (Supplemental Provisions) Act 1961* provides that:

*'Where the Chief Justice is of opinion that the conduct of a justice of the District Court has been such as to bring the administration of justice into disrepute, the Chief Justice may interview the justice privately and inform him of such opinion.'*¹⁵

Hogan and Whyte (2003) state that these provisions give rise to 'constitutional objections' when viewed in light of Article 35.4.1 and they ask:

'If the Houses of the Oireachtas are the sole judges of whether a judge has misbehaved for the purposes of Article 35.4.1, should a judicial figure be given a parallel role in investigating such conduct?'

Incapacity and Stated Misbehaviour

No definition of 'incapacity' or of 'stated misbehaviour' is provided in Bunreacht na hÉireann although 'incapacity' is accepted as encompassing physical or mental incapacity.¹⁶ The phrase 'stated misbehaviour' is not so readily understood and, to date, no judicial or

¹⁴ See eg: Irish Times, 3rd July 2000 [Inquiry into judge begins this week](#) and RTÉ News, 5th December 2000, [Report finds Ó Buachalla carried out functions without bias](#). (Both last accessed 23rd June 2014). The investigation into Judge Donnchadh Ó Buachalla is discussed in detail in: Cahillane, L. (2009) *Disciplining Judges: The Special Position of District Court Judges* Vol 5 Irish Law Review 14 available at: http://www.claruspress.ie/ILR_Final%20proof_Web.pdf (Last accessed 27th May 2014).

¹⁵ Section 10 of the *Courts (Supplemental Provisions) Act 1961* may be accessed here: <http://www.irishstatutebook.ie/1961/en/act/pub/0039/sec0010.html#sec10> (Last accessed 29th May 2014).

¹⁶ Kelly, J.M. ((2003) *The Irish Constitution* (4th Ed) Hogan, G. and Whyte, G. (eds) Tottel, Dublin at p. 1011.

statutory definition of the term has been given. It is very likely that a conviction for a serious criminal offence would suffice but the issue is by no means one that is clear cut since the impeachment process has not been used since the foundation of the State. There have been two occasions on which the procedure came close to being used although the ultimate result in both cases was that the judges in question resigned from office.

The Sheedy Affair

The first such occasion was the so-called 'Sheedy Affair' in 1999. This arose in somewhat convoluted circumstances, the essence of which is that Mr Sheedy had been serving a prison sentence which was being reviewed by a judge who was, at the time of the review, a Circuit Court judge but was subsequently elevated to the High Court bench. There had been an intervention in the case by a judge of the Supreme Court who had been told about Mr Sheedy's case informally and had involved himself by suggesting that an application could be made to have the case re-listed and by discussing the matter with the relevant Court Registrar.

The case was re-listed and the subsequent review of Mr Sheedy's sentence resulted in his being released from custody. There were a number of difficulties with the manner in which the review of Mr Sheedy's sentence had been conducted. The first difficulty arose because the reviewing judge had acted on the basis of a psychological report on Mr Sheedy which had not been updated since he had been sentenced.

The second problem with the way in which the sentence review was conducted was that the State was not represented at the hearing.¹⁷ Byrne and McCutcheon (2009) give a detailed account of the Sheedy Affair including the circumstances in which the re-listed hearing proceeded in the absence of a

¹⁷ Byrne, R. and McCutcheon P. (2009) *The Irish Legal System* (5th Ed) Bloomsbury, Dublin at p. 159.

solicitor from the Chief State Solicitor's Office.¹⁸

The matter was the subject of intense media and public interest and the Minister for Justice decided that an investigation in the matter should be conducted by the Chief Justice.¹⁹ The report noted the public disquiet about the affair which was said to be shared by the judiciary. It was critical of the conduct of both judges. It described the intervention of the Supreme Court judge as *'inappropriate and unwise, that it left his motives and action open to misinterpretation and that it was therefore damaging to the administration of justice* although it acknowledged that the judge had been motivated by humanitarian concerns.

The report concluded that the judge carrying out the review of Mr Sheedy's sentence had *'failed to conduct the case in a manner befitting a judge'* and that the judge's handling of the matter *'compromised the administration of justice.'* No recommendations were made in the report. The reason for this was set out by the Chief Justice in the report where he stated that:

*'In conclusion, I must, and do, emphasise that I, as Chief Justice, have no jurisdiction, whether under the provisions of the Constitution or any Act passed by the Oireachtas, to make any recommendations arising out of the facts in this case and, I do not, for this reason, propose to do so.'*²⁰

Although no formal steps were taken by the Oireachtas to remove either of the judges involved in the Sheedy controversy, the possibility that this might, or ought to, happen was widely

¹⁸ *ibid*

¹⁹ Dáil Debates, 1st April 1999 available at: <http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dai1999040100024?opendocument> (Last accessed 3rd June 2014).

²⁰ Byrne, R. and McCutcheon P. (2009) *Byrne and McCutcheon on the Irish Legal System* (5th Ed) Bloomsbury, Dublin pp 154 - 174

discussed in the media.²¹ Ultimately, both judges resigned and the matter went no further.²²

The Curtin Case

The facts giving rise to the threatened impeachment of Judge Brian Curtin are relatively well-known. In summary, they are that Judge Brian Curtin, a judge of the Circuit Court, was charged with possession of images of child pornography. He was acquitted on the direction of the trial judge because the evidence against him had been obtained on foot of a stale warrant and was, consequently, inadmissible.

Subsequently, steps were taken in order to seek his impeachment. Firstly, a motion calling for his impeachment in accordance with Article 35.4.1 was passed and secondly, a Joint Committee was set up for the purpose of investigating the matter.

Two statutory amendments were also required. One was an amendment to s. 3 of the *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997* ("the 1997 Act") to enable judges to be compelled to attend as witnesses into investigations into their conduct. The second statutory amendment was to the *Child Trafficking and Pornography Act 1998* to enable material on Judge Curtin's computer to be accessed by the Committee without potentially incurring criminal liability by doing so.

Judge Curtin initiated a High Court challenge to the legality of s. 3 of the 1997 Act, the request by the Committee to have access to his computer and to the inquiry itself. The High Court rejected the challenge and the matter went on appeal to the Supreme Court. The net

issues to be decided by the Supreme Court were:

- The constitutionality of the impeachment process set out in the newly adopted Standing Orders 63A and 60A of Dáil Éireann and Seanad Éireann respectively;²³
- The constitutionality of s. 3A of the 1997 Act, as amended;
- Whether the Committee could validly make an order for the inspection of Judge Curtin's computer.

The Supreme Court dismissed the appeal and upheld the ruling of the High Court. Its decision, in summary, was that:

- Nothing in Bunreacht na hÉireann prevented the Oireachtas from adopting standing orders setting up a committee to inquire into the 'stated misbehaviour' of a judge;
- Judge Curtin was entitled to the benefit of fair procedures and constitutional justice;
- Section 3A of the 1997 Act, as amended was not in breach of Bunreacht na hÉireann and did not amount to an unlawful incursion into judicial independence;
- The Committee could lawfully take possession of Judge Curtin's computer despite the fact that it contained material that was illegal to possess.

Judge Curtin's computer was subsequently made available to the Committee when the inquiry commenced again after the Supreme Court proceedings and a report was commissioned from an expert. Subsequently, Judge Curtin sought an adjournment of the inquiry on grounds of ill-health. This was not granted and

²¹ See e.g. Irish Times, 17th April 1999 [Judges should resign in wake of report](#) and Irish Times 17th April 1999 [An old, familiar case of class advantage](#) (Both last accessed 23rd June 2014).

²² Irish Times, 19th April 1999 [Confrontation between the Oireachtas and the judiciary being averted](#) (Last accessed 23rd June 2014).

²³ The procedures governing the removal from office of a judge are now set out in Standing Order 65 of [Dáil Éireann Standing Orders Relative to Public Business \(2011\)](#) Standing Order 54 of the Seanad Éireann [Standing Orders Relative to Public Business \(2011\)](#) is the equivalent Standing Order in the Upper House.

Judge Curtin resigned from office thereby ending the impeachment process.

Current procedure

The current procedure for the removal of judges derives from Articles 35.4.2 and 35.4.3 which provide that:

‘The Taoiseach shall duly notify the President of any such resolutions passed by Dáil Éireann and by Seanad Éireann, and shall send him a copy of every such resolution certified by the Chairman of the House of the Oireachtas by which it shall have been passed’.

Article 35.4.3 imposes an obligation on the President to remove the judge from office. The Article states that:

‘Upon receipt of notification and of copies of such resolutions and of copies of such resolutions, the President shall forthwith, by an order under his hand and Seal, remove from office the judge to whom they relate’.

The procedural requirements of Article 35 in respect of the removal of judges is notably less detailed than the comparable provision in Bunreacht na hÉireann which deals with the removal from office of the President. The President may be impeached for stated misbehaviour, according to Article 12.10.1. In summary, the procedure to be used for this is set out in Article 12.10.2-7.

- Under Article 12.10.2 the charge must be preferred by either the Dáil or the Seanad;
- Article 12.10.3 requires that a proposal to either House of the Oireachtas calling for the removal of the President must be on foot of a notice signed by not less than 30 members of that House;
- Under Article 12.10.4 a resolution adopting a proposal to prefer a charge against the President requires the support of a 2/3 majority of the membership of the House;

- Article 12.10.5 requires that the investigation into the substance of the charge against the President must be carried out by the other House of the Oireachtas;
- The President is entitled, under Article 12.10.6, to appear and be represented at the investigation into his conduct;
- If the investigation results in the passing of a resolution calling for removal from office, such resolution must be supported by at least 2/3 of the House carrying out the investigation. The resolution must state that the charge against the President has been sustained and that the conduct which he engaged in renders him unfit to continue in office. The effect of this resolution is to remove the President from office.

Although the provisions of Article 35 of Bunreacht na hÉireann lack the level of detail provided in Article 12, they are supplemented by the Standing Orders of both Dáil and Seanad Éireann.

In addition the *Houses of The Oireachtas (Inquiries, Privileges and Procedures) Act 2013* (“the 2013 Act”) sets out how the Oireachtas should conduct inquiries including inquiries into the removal of certain officeholders including judges.²⁴ In summary, the purpose of the 2013 Act is to give statutory expression to the decision of the Supreme Court in *Maguire v Ardagh* (“the Abbeylara Case”).²⁵

The most significant part of the Supreme Court’s ruling in the Abbeylara Case was that the Oireachtas was held to have no inherent power to conduct an inquiry similar to the one set up to investigate the circumstances surrounding the death of

²⁴ The *Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013* may be accessed here: <http://www.irishstatutebook.ie/2013/en/act/pub/0033/index.html> (Last accessed 3rd June 2014). The 2013 Act repealed the *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997*

²⁵ [2002] 1 I.R. 385 (“the Abbeylara Case”).

Mr John Carthy, who had been shot by Gardaí in 2000.

In summary, the effect of the ruling is that an Oireachtas committee is precluded from making findings of fact in the course of an inquiry which are adverse to the good name of a person who is not a member of either House of the Oireachtas. Such committees are also obliged to observe the rules of natural and constitutional fairness.²⁶

A referendum was held in 2011 for the purpose of extending the powers of investigation of Oireachtas committees but this amendment to Bunreacht na hÉireann was rejected by the people.

An inquiry under Article 35 of Bunreacht na hÉireann differs from the type of inquiry dealt with in the Abbeylara Case because it is carried out by the Oireachtas pursuant to Bunreacht na hÉireann and it may, of necessity, involve making a finding of fact that is adverse to the reputation of the judge in question.

Section 9 of the 2013 Act provides that an Oireachtas committee is permitted, following a resolution to that effect, to conduct an inquiry into the removal or proposed removal from office of certain officeholders.

Inquiries under Article 35 of Bunreacht na hÉireann are expressly included, as are the relevant statutory provisions dealing with the removal from office of Circuit and District Court judges.

Accordingly, a committee is empowered to:

- Record evidence and report on it;
- Make a finding of fact that is adverse to the good name of the person who is the subject of the inquiry;
- Make recommendations based on such findings.

A committee set up to carry out an investigation under s. 9 of the 2013 Act is not permitted to go beyond the scope of

²⁶ For example, the *audi alteram partem* rule requires that both sides are heard.

its Terms of Reference and it may only send for persons, papers and/or records if it is specifically permitted to do so.

Proposals for Reform

The Constitution Review Group (“CRG”) (1996) recommended that Article 35 be amended to permit the judiciary to exercise disciplinary power in cases of conduct falling short of the ‘stated misbehaviour’ required for impeachment.²⁷

The CRG identified a number of issues that they deemed worthy of amendment in the context of impeachment and recommended that the impeachment process set out in respect of the President in Article 12 of Bunreacht na hÉireann should be replicated in Article 35 but that it should not be extended to judges of the Circuit and District Courts.²⁸

The CRG also recommended the addition of qualifying language to the term ‘stated misbehaviour’ in order to provide clarity.²⁹ The Fourth Progress Report of the All Party Committee on the Constitution echoed these recommendations.

The establishment of a Committee on Judicial Conduct and Ethics, by the Chief Justice was recommended in the Sixth Report of the Working Group on a Courts Commission in 1998 and this Committee was duly set up in 1999 in the aftermath of the Sheedy Affair.³⁰

²⁷ The Report of the Constitution Review Group (1996) may be accessed here: <http://archive.constitution.ie/reports/crg.pdf> (Last accessed 16th May 2014).

²⁸ *ibid* The reason given by the CRG was that: ‘...such a change would be inconsistent with the establishment of the District and Circuit Courts by Act of the Oireachtas as provided in Article 34.3.4 and the policy of the Review Group to give the Oireachtas discretion as to the type of courts which it may establish;.

²⁹ The CRG suggested that the phrase ‘prejudicial to the office of judge’ be used to qualify the term ‘stated misbehaviour’.

³⁰ Working Group on a Courts Commission (1999) *Sixth Report* available here: [http://www.courts.ie/Courts.ie/Library3.nsf/\(WebFiles\)/96E384ACEAED7F4F80256DA6003](http://www.courts.ie/Courts.ie/Library3.nsf/(WebFiles)/96E384ACEAED7F4F80256DA6003)

The Committee published a report on Judicial Conduct and Ethics in 2000 in which it recommended that a Judicial Council be established to deal with judicial conduct and ethics, judicial studies and conditions of work.³¹

The Irish Council for Civil Liberties (“ICCL”) has also recommended the introduction of a statutory framework for dealing with matters of judicial conduct and complaints against the judiciary.³²

In 2010 the Minister for Justice published the General Scheme of the *Judicial Council Bill* which was aimed at implementing many of the recommendations for reform in the area of judicial conduct and accountability contained in previous reports.³³

This Bill was not published at that time but is currently on the ‘A’ List of the Government’s Legislation Programme.³⁴ The stated purpose of the Bill is to provide effective remedies for complaints about judicial misbehaviour. The Bill will also provide for lay participation in the investigation of complaints.

[9A0B8/\\$FILE/court6.pdf](#) (Last accessed 16th May 2014).

³¹ The Fourth Progress Report of the All Party Committee on the Constitution: *The Courts and the Judiciary* (1999) may be accessed here: <http://archive.constitution.ie/reports/4th-Report-Courts.pdf> (Last accessed 16th May 2014).

³² Irish Council for Civil Liberties (2007) *Justice Matters: Independence, Accountability and the Irish Judiciary* available here: [http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--\(july-2007\)-.html](http://www.iccl.ie/-justice-matters-independence-accountability-and-the-irish-judiciary-parts-1-and-2--(july-2007)-.html) (Last accessed 16th May 2014).

³³ Department of Justice, Equality and Law Reform, Press Release, 23rd August 2010 available here: <http://www.justice.ie/en/JELR/Pages/Minister%20Ahern%20publishes%20scheme%20of%20the%20Judicial%20Council%20Bill%202010> (Last accessed 27th May 2014).

³⁴ Government Legislation Programme available here: http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/SECTION_A1.html (Last accessed 16th May 2014).

Removal from judicial office in other common law jurisdictions

For comparative purposes, the means by which judges are removed from office in a number of other common law jurisdictions are set out below. The jurisdictions covered are England and Wales, Canada, New Zealand, and the United States. In the cases of Canada and the United States only the procedures for the removal of judges appointed to federal office are covered.

England and Wales

The power to remove judges of the senior courts in England and Wales derives from the *Act of Settlement 1701* which allowed for a judge to be removed from office for serious misconduct. The power is now contained in s. 11 of the *Senior Courts Act 1981*.³⁵

Section 11 deals with the tenure of judges and provides that a judge shall hold office ‘*during good behaviour*’ and may be removed from office by the Queen upon the petition of both Houses of Parliament. Less senior judges may be removed from office by the Lord Chancellor with the agreement of the Lord Chief Justice.

The retirement age for judges is 70 years of age. Judicial office may be vacated in a variety of ways, for example, upon taking another judicial office or by resigning from office.

The section also provides for the vacating of judicial office on grounds of incapacity. In such cases, the Lord Chancellor may declare a judge to have vacated office if satisfied, by means of a medical certificate, that the judge is suffering from a permanent infirmity or is for the time being incapable of discharging his duties. In these circumstances, the Lord Chancellor may, by instrument, declare the office to be vacated.

³⁵ This Act was originally called the *Supreme Court Act 1981*. It has been amended by the *Constitution Reform Act 2005*.

Up until 2005, it appears that the Lord Chancellor only exercised his power to remove a judge from office on two occasions. The first of these occurred in 1830 when Sir Jonah Barrington, an Irish judge, was removed from office for misappropriating money.

The second occasion was in 1983 when Judge Bruce Campbell, a Circuit Court judge was removed from office after being found to have smuggled alcohol and cigarettes into England from the Channel Islands in his private yacht.

Since the passing of the *Constitution Reform Act 2005* (“the 2005 Act”) responsibility for judicial conduct and discipline is jointly shared by the Lord Chancellor and the Lord Chief Justice. They are assisted in this role by the Judicial Conduct Investigation Office (“JCIO”) which was established in 2006.³⁶ The JCIO can only deal with complaints arising from the conduct of a judge and not the merits or otherwise of any judicial decision.

The procedures and rules governing the conduct of an investigation into a complaint about judicial conduct are set out in the *Judicial Discipline (Prescribed Procedures) Regulations 2013*.³⁷ These (and other regulations) were made by the Lord Chancellor under the 2005 Act.³⁸

In essence, a valid complaint against a judge is investigated by the JCIO and if any action is to be taken, a recommendation to this effect is made to the Lord Chancellor and the Lord Chief

Justice who must agree on the final decision.³⁹

The JCIO may contact the complainant or the judge against whom a complaint is made if insufficient information is provided in order to obtain further details of the complaint. The judge against whom a complaint is made is entitled to be heard on the matter and to make submissions. A decision may be referred to a Review Body.⁴⁰

The latest Annual Report of the JCIO reveals that in 2013/2014 a total of 2,018 were received, down from 2,154 in 2012/2013. These are set out in Table 1 below:

Table 1: Complaints received in 2012/2013 and 2013/2014 by JCIO.

| Judicial Office Held | Number of Complaints in 2012/2013 | Number of Complaints in 2013/2014 |
|-------------------------------------|-----------------------------------|-----------------------------------|
| High Court | 119 | 81 |
| Circuit Bench (Including Recorders) | 435 | 329 |
| Court of Appeal | 30 | 30 |
| Coroner | 44 | 51 |
| District Bench | 754 | 651 |
| Court of Protection | 2 | 2 |
| Tribunals (Combined) | 14 | 15 |
| Magistrates | 28 | 30 |
| Not defined | 728 | 829 |
| Total | 2,154 | 2,018 |

Source: Office for Judicial Complaints, Annual Reports for 2012/2013 and 2013/2014

³⁶ Until October 2013 this office was known as the Office for Judicial Complaints. Information about the JCIO may be found on their website:

<http://judicialconduct.judiciary.gov.uk/> (Last accessed 14th May 2014).

³⁷ A complaint may be made by any person who feels that a judge’s conduct towards them has fallen short of acceptable standards.

³⁸ The full range of regulations applicable to the JCIO is available here:

[http://judicialconduct.judiciary.gov.uk/documents/Judicial_Discipline_\(Prescribed_Procedures\)_Regulations_2013.pdf](http://judicialconduct.judiciary.gov.uk/documents/Judicial_Discipline_(Prescribed_Procedures)_Regulations_2013.pdf) (Last accessed 14th May 2014).

³⁹ For a complaint to be valid it must be in writing, made within three months of the incident being complained of and it must pertain to the conduct, as opposed to the decision(s) of the officeholder. This period may be extended but only in exceptional circumstances.

⁴⁰ The JCIO publishes [Disciplinary Statements](#) on its website in accordance with its [Publication Policy](#) (Both last accessed 24th June 2014).

The Annual Reports also give details about the type of formal disciplinary action taken. In 2013/2014 58 cases were concluded. Of these, 17 resulted in removal from office, among them four judges. Formal advice was given in 12 cases in total. Ten of these were judges. From a total of 13 warnings and 14 reprimands, two of each were issued to judges. Two office holders were suspended, one of whom was a judge.

In 2012/2013 55 cases were finalised. Twenty of these resulted in removal from office, one of whom was a judge. A further nineteen officeholders were reprimanded, among them six judges. Informal guidance was given to eight judges and one coroner. A total of sixteen officeholders, among them one judge, resigned from office.⁴¹

Canada

Once appointed, federal judges in Canada remain in office until they reach the mandatory retirement age which is 75 unless they retire or are removed from office by Parliament.

Issues pertaining to the conduct and discipline of federal judges in Canada are dealt with by the Canadian Judicial Council (“the Council”), a federal statutory body established by Part 2 of the *Judges Act 1985*.⁴² The Council comprises 39 members who are all members of the Canadian judiciary. It is chaired by the Chief Justice of Canada.⁴³

⁴¹ Office for Judicial Complaints (2013) *Annual Report 2012 – 2013*. The Report may be accessed at the following link: http://judicialconduct.judiciary.gov.uk/documents/OJC_Annual_Report_2012_-_2013.pdf (Last accessed 23rd June 2014). Judicial Conduct Investigations Office (2014) *Annual Report 2013 – 2014* may be accessed here: http://judicialconduct.judiciary.gov.uk/documents/jcio_annual_report_2013_-2014.pdf (Last accessed 25th July 2014).

⁴² The *Judges Act 1985* may be accessed here: <http://laws-lois.justice.gc.ca/eng/acts/J-1/> (Last accessed 24th June 2014).

⁴³ The Council is supported in its role by the staff of the Council Office, located in Ottawa

The Council is responsible for dealing with complaints received about federal judges and these may be made by any member of the public, the Attorney General or the Minister for Justice. The Council must commence an inquiry into the conduct of a federal judge on foot of a request from the Attorney General or the Minister for Justice but has discretion in respect of all other complaints.⁴⁴

Anonymous complaints are treated ‘to the greatest extent possible in the same manner as any other complaint.’⁴⁵

The procedures for dealing with complaints are set out in the *Inquiries and Investigations Bye-laws (2010)* and in the *Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges (2014)* which were drawn up by the Council.⁴⁶

The Council is empowered to deal only with complaints arising from the conduct, as distinct from a decision, of a federal judge. The complaints process has a number of stages and each one contains an in-built threshold which must be met before a complaint can progress to the next stage.⁴⁷

The administrative side of the judicial conduct review process is conducted by the Executive Officer of the Judicial Conduct Committee. The Executive Officer, who is not a judge, works under

and headed by the Executive Director. See: https://www.cjc-ccm.gc.ca/english/about_en.asp?selMenu=about_members_en.asp#STAFF (Last accessed 24th June 2014).

⁴⁴ Section 63 of the *Judges Act 1985*

⁴⁵ Section 2(3) of the *Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges (2014)* (Last accessed 24th June 2014).

⁴⁶ The 2010 Bye-laws may be accessed [here](#) (Last accessed 24th June 2014).

⁴⁷ This only applies to complaints from the general public since the Council has no discretion in the case of inquiries requested by the Attorney General or the Minister of Justice.

the direction of the Chairperson of the Committee.⁴⁸

At the first stage of the process the Executive Officer will open a file on a complaint that is received in writing and which names a federal judge provided that the complaint is not '*clearly irrational or an obvious abuse of the complaints process.*'⁴⁹

Then, at the second stage of the process, a complaint for which a file has been opened is referred to the Chairperson of the Judicial Conduct Committee. The complaint may either be dismissed at this stage or further information may be sought from the complainant, the judge whose conduct is being investigated, or the Chief Justice in the judge's province. The Chairperson may then review any further information received and may:

- Decide that no further action is necessary and close the file; or
- Decide that the conduct was not appropriate but that no remedial action is required and he may inform the judge of this view, in writing.

In the event that some form of action is to be taken against the judge, the Chairperson has a number of options:

- Keep the file open until remedial action is taken by the judge in question; or
- Appoint outside counsel to carry out further inquiries and to provide a report of his findings. The Chairperson may close the file if the findings of the report show that no further action is necessary. If, however, the judge acknowledges that his conduct was inappropriate, the file may be

⁴⁸ The Judicial Conduct Committee is a standing committee chaired by the Chief Justice of Canada.

⁴⁹ Section 2(2) of the Complaint Procedures (2014) *op cit* at n.43 above.

held open until remedial action is taken by the judge;⁵⁰

- Refer the matter to a Review Panel.

The third stage of the process is a review of a judge's conduct by a Review Panel. This occurs in cases which have come through the earlier stages, as outlined above. The Review Panel does not have the power to compel the attendance of witnesses or to take evidence but it may do any of the following:⁵¹

- Direct outside counsel to carry out further inquiries into the matter;
- Close the file if it concludes that the conduct of the judge does not warrant removal from office. The file may be kept open until any recommended remedial action is taken. The Review Panel may also write to the judge outlining its concern about his conduct;
- Set up an Inquiry Committee in cases where the conduct of the judge is deemed sufficiently serious to warrant removal from office.⁵²

The fourth stage of the process is a review of the judge's conduct by an Inquiry Committee established under the authority of the Review Panel. The Inquiry Committee comprises an uneven number of members.⁵³

⁵⁰ Canadian Judicial Council (2014): [Review of the Judicial Conduct Process of the Canadian Judicial Council – Background Paper](#) (Last accessed 24th June 2014). A concise overview of the current complaints process is provided in the Background Paper at pp.17-25.

⁵¹ *ibid*

⁵² Review Panels may have 3 or 5 members, all of whom are judges.

⁵³ In accordance with the 2010 Bye-Laws, the Inquiry Committee may not include the Chairperson of the Council, any member of the Review Panel involved in the case, or any member of the court on which the judge under investigation sits.

The Inquiry Committee has the power to summons witnesses and to take evidence under oath. It also has the power to direct the production of documents. The Inquiry Committee investigates the complaint and prepares a report of its findings and conclusions in respect of whether removal from office should be recommended. This report is submitted to the Council.

The fifth, and final, stage of the process involves the consideration by the Council of the report and conclusions of the Inquiry Committee. A quorum of 17 members is required for this purpose. The Council must then decide whether the conduct of the judge is such that he is *'incapacitated or disabled from the due execution of the office of judge'*.

In cases where the Council decides that a judge should be removed from office, it must make this recommendation to Parliament through the Minister for Justice but, to date, the Council has not recommended the removal of any federal judge.⁵⁴

A public consultation on the judicial conduct process is currently underway in Canada. Its aim is to review the process and to identify any shortcomings. Citizens are invited to submit their views on the process and a Background Paper has been prepared by the Canadian Judicial Council for the purposes of the review.⁵⁵

New Zealand

Judges in New Zealand remain in office until they retire or resign. In exceptional circumstances, which have not arisen to date, judges may be formally removed from office.

Prior to 2004 complaints against judges were handled by the head of the bench of which the judge was a member. Complaints were heard in private and any

⁵⁴ Details of all investigations by the Council into the conduct of federal judges are available here: http://www.cjc-ccm.gc.ca/english/lawyers_en.asp?selMenu=lawyers_bylaw_en.asp (Last accessed 14th May 2014).

⁵⁵ *op cit* at n. 46 above.

sanction imposed was also private. Questions about accountability and the transparency of the process prompted the enactment of the *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* ("the 2004 Act").⁵⁶

Since the passing of the 2004 Act, allegations of judicial misconduct have been dealt with by the Judicial Conduct Commissioner ("the Commissioner"), and where necessary, the Judicial Conduct Panel ("the Panel").

The Judicial Conduct Commissioner

The office of the Commissioner is obliged to receive and deal with complaints about the conduct of a judge. A complaint may be made by any person and once it is received, the judge to whom it relates must be notified. The Commissioner must carry out a preliminary examination of the complaint and must decide whether:

- There are grounds on which he may exercise his power to dismiss the complaint on the basis that it does not satisfy the requirements of the 2004 Act;⁵⁷
- There are any grounds on which to take no further action;⁵⁸
- The matter should be referred to the head of the relevant bench;
- The complaint, if substantiated would be serious enough to warrant consideration to be given to removing the judge from office.

At the conclusion of the preliminary examination, the Commissioner must do one of the following:

⁵⁶ The 2004 Act may be accessed here: <http://www.legislation.govt.nz/act/public/2004/0038/latest/DLM293553.html> (Last accessed 15th May 2014).

⁵⁷ These requirements include: a complaint must be about a currently serving judge, it must not be frivolous or vexatious, it must not relate to matters which pertain to matters which should be dealt with by way of appeal or judicial review.

⁵⁸ The power to take no further action may be used where any further action would amount to an injustice. The Act sets out a number of circumstances in which this might arise. For example, where a complaint is made in good faith but is based on a misunderstanding.

- Dismiss the complaint;
- Exercise his power to take no further action;
- Refer the matter to the head of the relevant judicial bench;
- Recommend that the Attorney General appoint a Judicial Conduct Panel to conduct an inquiry into the conduct of the judge.

The Judicial Conduct Panel

The Panel is appointed by the Attorney General and is comprised of three members, one of whom is a lay person and the other two being members of the legal profession and/or judiciary. The Panel must inquire into the conduct of a judge when a complaint is referred to it by the Attorney General on the recommendation of the Commissioner.

The Panel is obliged to hold a hearing into the matter. The hearing is held in public although the Act provides that reporting restrictions may be imposed. The judge whose conduct is under investigation is entitled to appear and be heard at the hearing and the Commission is obliged to pay for the reasonable costs of representation incurred by the judge.

At the conclusion of the investigation, the Panel is obliged to provide a report of its findings to the Attorney General.⁵⁹ The Panel must also include its recommendations as to whether the Attorney General should consider removing the judge from office. The Panel must also state the reasons behind its decision.

The 2004 Act provides that the decision to initiate the process of removing a judge is one which is at the discretion of the Attorney General. A judge must not

be removed from office by the Attorney General unless the Panel has recommended this course of action. There is one exception to this general rule and this occurs in circumstances where a judge is convicted of a criminal offence punishable by a custodial sentence of a minimum 2 years' imprisonment. In such cases, the Attorney General is empowered to act independently of the procedure set out in the 2004 Act and to initiate the removal of the judge.

Senior judges may only be removed from office by the Governor General on an address from Parliament calling for removal on grounds of misconduct or inability to fulfil the functions of office.⁶⁰

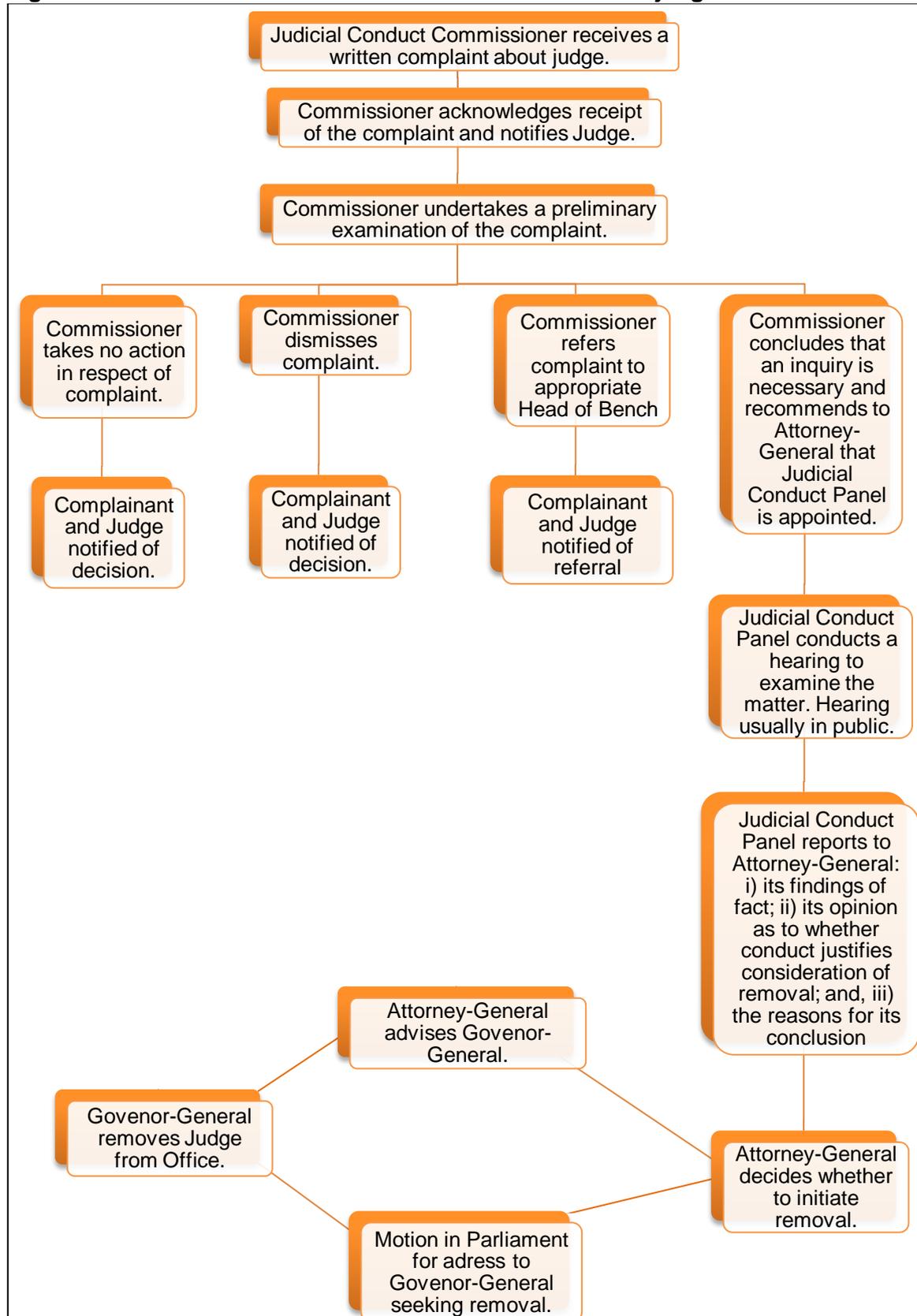
Judges of the District Court may be removed from office by reason of misbehaviour or inability. In these cases, the Attorney General advises the Governor General to remove the judge from office but no parliamentary motion is required.

Ultimately, however, the power to remove any judge from office in New Zealand is vested in the Governor General. The complaints mechanism provided for by the 2004 Act is set out in the form of a diagram in Schedule 1 to the Act and is reproduced below at Figure 1.

⁵⁹ In New Zealand, the Attorney General is a Government Minister and the current holder of that office is Mr Christopher Finlayson, MP. This differs from the position in Ireland where the Attorney General is constitutionally prohibited from being a member of the government. More details may be found here: <http://www.parliament.nz/en-nz/mpp/mps/current/50MP127321/finlayson-christopher> (Last accessed 25th June 2014).

⁶⁰ Parliamentary procedure in the New Zealand Parliament is set out in the [Standing Orders of the House of Representatives \(2011\)](#) (Last accessed 25th June 2014).

Figure 1: Schedule 1 to the 2004 Act: Process to remove a judge in New Zealand



* Judicial Conduct Commissioner or Commissioner includes a Deputy Judicial Conduct Commissioner carrying out the Commissioner's functions when the Commissioner has a conflict of interest, is absent from office, or is incapacitated, and during a vacancy in the office of Commissioner. Source: <http://www.legislation.govt.nz/act/public/2004/0038/latest/whole.html#DLM293719>

United States

Article III of the Constitution of the United States deals with the tenure of judges and provides that judges hold office 'during good behaviour' until they retire or are removed from office following impeachment.⁶¹

The process of impeachment is provided for by Article II of the US Constitution which states that:

'The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.'

The US House of Representatives has sole power to decide whether the impeachment process is appropriate in the given circumstances of a case. The choice of articles of impeachment is also a matter for the House of Representatives.⁶² The matter is then referred to the US Senate which has sole responsibility for the impeachment trial itself. The procedures which must be followed are set out in the *Rules of Procedure and Practice in the Senate when Sitting in Impeachment Trials* (1986).⁶³

The impeachment process may only be used in respect of the President and Vice-President of the United States and 'civil officers'. This term is not defined in the US Constitution or in statute but there is no question that members of the federal judiciary fall within its scope and there is long-standing authority to support

this. In *United States v Mourat*⁶⁴ the US Supreme Court stated that:

'Unless a person in the service of government holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.'

Clearly, citizens are excluded from the scope of the impeachment process but a former civil officer of the United States can still be impeached for acts done whilst in a relevant office.⁶⁵

The type of conduct alleged against the office holder must also fall within the scope of Article III which specifies 'treason, bribery or other high crimes and misdemeanours'. The terms 'treason' and 'bribery' are not especially problematic. Treason is defined in the US Constitution and it is also provided for in statute. Bribery is an offence at common law and under statute in the United States. The term 'other high crimes and misdemeanours' is less clear cut, however and it is not defined anywhere.

Conduct which may not amount to a crime may be regarded as sufficient for the purposes of impeachment. Moreover, in apparent contrast to other common law jurisdictions, the US impeachment process appears to cover a broader range of issues. In other jurisdictions, it is generally the case that a judge cannot face disciplinary measures or impeachment for his decisions since these are more properly dealt with by way of appeal or other form of judicial review. In the US, however, the impeachment process does not appear to be confined in such a way. For example,

⁶¹ The text of the Constitution of the United States may be accessed here: http://www.senate.gov/civics/constitution_item/constitution.htm (Last accessed 15th May 2014).

⁶² The term 'articles of impeachment' is analogous to the concept of 'charges' or 'allegations'.

⁶³ The Senate Rules may be accessed here: <http://www.law.cornell.edu/background/impeach/senaterules.pdf> (Last accessed 15th May 2014).

⁶⁴ 124 U.S. 303 (1888)

⁶⁵ Bazan, E. and Henning, A. (2010). *Impeachment: An Overview of Constitutional Provisions, Procedure and Practice* Congressional Research Service available here: <http://www.law.cornell.edu/background/impeach/senaterules.pdf> (Last accessed 15th May 2014).

Bazan and Henning (2010) outline the case of one judge who was convicted on several articles of impeachment, among them allegations that he had refused to hear testimony in a case and that he had refused an appeal. In other common law jurisdictions it is more likely that such matters would be raised on appeal and would be outside the scope of disciplinary or removal procedures.

A majority of 2/3 of the Senate members present is required in order to convict an office holder in an impeachment trial and where there are several articles of impeachment, a conviction on any of them will suffice to impeach the office holder.⁶⁶ In the event that the Senate votes to convict, it must then determine which of two consequences will apply to the impeached office holder. These are:

- Removal from office, or
- Removal from office with a prohibition on holding any other office of public trust.⁶⁷

In the period between 1803 and 2003 fifteen federal judges have been impeached in the US. Of these, eight judges were convicted and removed from office; four judges were acquitted and three resigned from office.⁶⁸

⁶⁶ Under the US Constitution, a simple majority of Members of the Senate is required in order for the House to conduct its business. Accordingly, 51 Senators must be present although this is often not the case. A quorum is presumed unless/until a Senator 'suggests the absence of a quorum' thereby prompting a Roll Call. For further information on the Senate rules on quorum, please see: Rybicki, E. (2013) *Voting and Quorum Procedures in the Senate* Congressional Research Service, available at: <http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%26%2A2D4QLO9%0A> (Last accessed 9th July 2014).

⁶⁷ This decision may be made by a simple majority of the members of the Senate present.

⁶⁸ From the website of the Federal Judicial Center: http://www.fjc.gov/history/home.nsf/page/judges_impeachments.html (Last accessed 15th May 2014).

Complaints about the Federal Judiciary

A separate procedure for dealing with complaints about the behaviour or disability of the US federal judiciary is contained in the *Judicial Conduct and Disability Act 1980*.⁶⁹ The 1980 Act has been amended on a number of occasions and is supplemented by rules drawn up and adopted by the Judicial Conference of the United States originally in 1986. The Judicial Conference is a statutory policymaking body, headed by the Chief Justice.⁷⁰ These procedural rules have since been revised and amended and the most recent version was adopted in 2008.⁷¹ A non-binding Code of Conduct for federal judges was adopted by the Judicial Conference in 1973 and continues to be used for guidance by the Judicial Councils and the Judicial Conference to assist in decision-making in the context of misconduct/disability proceedings.

Under the 1980 Act, any person may make a complaint about the conduct of a federal judge. The complaint must be in writing and is filed with the Clerk of Appeals for the relevant Circuit in which the complaint arises. There are 13 federal Circuits in the US and, in accordance with the 1980 Act each one established a Judicial Council for the purpose of reviewing complaints and imposing sanctions, where necessary. A

⁶⁹ A link to the Judicial Conduct and Disability Act 1980 may be found on the website of the US Courts: <http://www.uscourts.gov/RulesAndPolicies/ConductAndDisability/JudicialConductDisability.aspx> (Last accessed 8th July 2014).

⁷⁰ Further information on the membership and functions of the Judicial Conference may be found here: <http://www.uscourts.gov/FederalCourts/JudicialConference.aspx> (Last accessed 8th July 2014).

⁷¹ Judicial Conference of the United States (2008) *Rules for Judicial-Conduct and Judicial-Disability Proceedings* available at: http://www.uscourts.gov/uscourts/RulesAndPolicies/Misconduct/jud_conduct_and_disability_308_app_B_rev.pdf (Last accessed 8th July 2014).

complaint must allege misconduct or disability and cannot pertain to any decision made by the judge. For the purposes of the 1980 Act 'misconduct' is behaviour which is *prejudicial to the effective and expeditious administration of the business of the courts*' and the term 'disability' means 'a temporary or permanent condition' that has the effect of rendering the judge 'unable to discharge the duties' of office. The complaint is reviewed by the Chief Judge of the relevant Circuit who may carry out a limited inquiry to determine whether the complaint should be proceeded with. At the conclusion of the review, the Chief Judge may either:

- Dismiss the complaint if it is not supported by fact or is invalid;
- Decide not to proceed if other corrective measures have been taken;
- Refer the complaint to a Special Committee, created for the purpose of investigating the complaint.⁷²

The Special Committee established for the purpose of investigating the complaint comprises an equal number of Circuit and District Judges. It is chaired by the Chief Judge of the relevant Circuit. The Special Committee investigates the complaint and prepares a report containing its findings and recommendations. This report is submitted to the Circuit Judicial Council which may:

- Dismiss the complaint;
- Require that corrective measures be taken. These may include the temporary suspension of case assignments to the judge, informal counselling, or reprimand;

⁷² Hellman, A. (2007) *Judges Judging Judges: The Federal Judicial Misconduct Statutes and the Breyer Committee Report* The Justice System Journal Vol. 28(3).

- Refer the complaint to the Judicial Conference which may impose further corrective measures.

If the misconduct is serious enough, the Judicial Conference may issue a recommendation to the House of Representatives that the judge be impeached.

Mixed system jurisdictions

A small number of countries operate a system of law which is derived from both common law and civil law traditions. The procedures for the removal of judges in two such countries, Scotland and South Africa are briefly set out here for comparative purposes.

Scotland

The Scottish courts system is administered by the Scottish Courts Service, a body established by the *Judiciary and Courts (Scotland) Act 2008* ("the 2008 Act").⁷³ The principle of judicial independence is enshrined in the legislation and this means that:

- Judges do not get involved in political debate;
- Judges are generally immune from civil proceedings or prosecution for what they do in the course of judicial office;
- Full-time judges can only be removed by a motion passed by the Scottish Parliament.⁷⁴

Judges in Scotland are appointed by the Queen on the recommendation of the

⁷³ The *Judiciary and Courts (Scotland) Act 2008* may be accessed here: <http://www.legislation.gov.uk/asp/2008/6/contents> (Last accessed 30th May 2014).

⁷⁴ Judicial Office for Scotland: http://www.scotland-judiciary.org.uk/Upload/Documents/JudicialIndependence_2.pdf (Last accessed 25th June 2014).

First Minister.⁷⁵ The applications process is administered by the Judicial Appointments Board for Scotland. In the normal course of events, a judge in Scotland will hold office until retirement age, set at 70 years.

In addition to the statutory commitment to safeguarding judicial independence and the obligation on judges to act in accordance with the principle of judicial independence, the Lord President of the Court of Session (“the Lord President”)⁷⁶ issued a Statement of Principles of Judicial Ethics for the Scottish Judiciary which sets out the standards to which the Scottish judiciary are expected to adhere in the course of their duties.⁷⁷

Chapter 4 of the 2008 Act deals with matters of judicial conduct and provides for a means by which complaints about judicial conduct may be investigated. The statutory provisions contained in the 2008 Act have been amplified by the *Complaints About the Judiciary (Scotland) Rules 2011* (“the Rules”) which were made by the Lord President in accordance with s. 28 of the 2008 Act.⁷⁸ These Rules set out a framework for handling complaints about the conduct of Scottish judges. A Guidance

Leaflet on the application of the Rules has also been published.⁷⁹

In essence, the Rules provide that a complaint may be made by any person about the conduct, inside or outside of court, of a judge. A complaint must be in writing and must provide certain details which are set out in the Rules. The complaints process cannot deal with issues arising from a decision of a judge or from the management of a case. A complaint must be made within three months although this period may be extended in exceptional circumstances. A complaint arising from a case that is ongoing (including an appeal) may not be considered until the proceedings have concluded. A complaint will be rejected if:

- Insufficient information is provided;
- It pertains to a decision or an issue of case-management;
- It raises issues that have already been dealt with
- It raises an issue that should be sent to the Judicial Complaints Reviewer;
- It is vexatious or without substance;
- It would not lead to disciplinary measures even if it was substantiated.⁸⁰

If a complaint is not dismissed at this stage, it will be sent to a Disciplinary Judge for a determination as to whether the complaint should be sent forward to a

⁷⁵ Further information on the Scottish Courts may be found here:

<http://www.scotcourts.gov.uk/> Information about the Scottish judiciary may be found at: <http://www.scotland-judiciary.org.uk/1/0/Home> (Both last accessed 26th June 2014).

⁷⁶ The most senior judge in Scotland.

⁷⁷ The *Statement of Principles of Judicial Ethics for the Scottish Judiciary (2010)* was revised in 2013. The revised version may be accessed here: <http://www.scotland-judiciary.org.uk/Upload/Documents/JudicialEthics2013.pdf> (Last accessed 25th June 2014).

⁷⁸ The *Complaints About the Judiciary (Scotland) Rules 2011* came into effect in February 2011 and may be accessed here: http://www.scotland-judiciary.org.uk/Upload/Documents/ComplaintsAboutTheJudiciaryScotlandRules2011_1.pdf (Last accessed 25th June 2014).

⁷⁹ Judicial Office for Scotland (2011) *Complaints about Judicial Conduct: Guidance Leaflet* (Revised 2011) available here: http://www.scotland-judiciary.org.uk/Upload/Documents/ComplaintsGuidanceLeaflet_10.pdf (Last accessed 25th June 2014).

⁸⁰ The Judicial Complaints Reviewer (“JCR”) is an office established under s. 30 of the 2008 Act. The function of the JCR is to provide guidance on the investigation of complaints and to review such investigations as required.

nominated judge. The Disciplinary Judge is a judge appointed by the Lord President to supervise the application of the Rules. One of the functions of the Disciplinary Judge is to nominate another judge who will investigate the allegation(s) made in the complaint. If, having considered the matter, the nominated judge takes the view that the issue is capable of being resolved without further investigation, he may communicate with the complainant and the judge in question with a view to achieving this outcome. If the matter can be resolved in this way, the nominated judge must inform the Judicial Office in writing and the matter will then cease to be considered under the 2011 Rules.⁸¹

In the event, however, that the matter is deemed by the nominated judge, to warrant further investigation, the nominated judge must then investigate it to determine the facts of the matter and whether the allegation is substantiated in whole or in part. If so, the nominated judge must decide whether the Lord President should exercise his power under s. 29 of the 2008 Act.⁸²

In carrying out his investigation, the nominated judge is given certain powers under the 2011 Rules. These are:

- To make such inquiries into the allegation as he considers appropriate;
- To interview any person(s) he considers appropriate;
- To obtain and examine any documentation, including recordings, that appears to him to

Both the complainant and the judge whose conduct is being investigated must be given the opportunity to make submissions. Any findings of fact are made on the balance of probabilities. At the end of the investigation, the nominated judge must prepare a written

report and send the file to the Judicial Office.

The file and the report are then sent to the Disciplinary Judge for further review prior to its being sent to the Lord President.

The result of the investigation may give rise to formal disciplinary measures, namely:

- Formal advice;
- Formal warning;
- Reprimand.⁸³

In addition to these statutory disciplinary measures, the Lord President may also take informal measures. The 2008 Act does not specify what these are.

The conduct envisaged by Chapter 4 of the 2008 Act is serious enough to warrant investigation and potential sanctions but falls short of the type of conduct that would lead to removal.

Full-time judges may only be removed by reason of inability to perform the duties of office, neglect of duty or misbehaviour. Judges of the higher courts in Scotland may only be removed on the recommendation of the First Minister and the means by which this may be done is set out in Part 5 of the 2008 Act.

If requested to do so by the Lord President, the First Minister must set up a statutory tribunal for the purpose of determining whether a particular judge is unfit for office. The First Minister may also set up such a Tribunal in such other circumstances as he sees fit but in this instance, the First Minister must first consult with the Lord President or the Lord Justice Clerk.⁸⁴ The tribunal set up under Part 5 of the 2008 Act must comprise:

- Two judges (current or retired);
- One currently practising advocate or solicitor who has been in practice for 10 years or more;

⁸¹ Rule 11(6).and (7)

⁸² Section 29 of the 2008 Act may be accessed here: <http://www.legislation.gov.uk/asp/2008/6/section/29> (Last accessed 26th June 2014)

⁸³ *ibid*

⁸⁴ The Lord Justice Clerk is the Lord President's deputy.

- One lay person who has not held high judicial office and who is not a qualified lawyer.

A judge whose fitness for office is the subject of an inquiry may be suspended from office during the investigation. When the investigation is finished the tribunal must prepare a report containing the reasons for its conclusion. This report is given to the First Minister who must then lay it before the Scottish Parliament.

The Scottish Parliament may resolve, on the motion of the First Minister, to remove the judge from office. The judge may be removed from office by the Queen on the recommendation of the First Minister.⁸⁵

South Africa

Impeachment of judges in South Africa is provided for in the Constitution of the Republic of South Africa 1996 ("the Constitution").⁸⁶ The Judicial Service Commission ("JSC") was established under s. 178 of the Constitution for the purpose of dealing with the appointment, conduct and, where necessary, the removal from office of judges.

Section 178 of the Constitution specifies the composition of the JSC which has twenty three members in total. If the JSC is dealing with the issue of judicial appointments, all members must be present. In all other cases, two categories of members, totalling ten members, are excluded.⁸⁷ This means that if the JSC is considering the conduct or capacity of a judge, only thirteen of the full number of members participate.

The members are drawn from the ranks of the legal professions, the judiciary,

⁸⁵ The removal of office holders from the Shrieval (Sheriff) Courts, Stipendiary Magistrates and Justices of the Peace may all be conducted under various statutory provisions.

⁸⁶ The Constitution of South Africa may be accessed here: <http://www.gov.za/documents/constitution/1996/index.html> (Last accessed 30th May 2014).

⁸⁷ These are 6 members from the National Assembly and 4 permanent delegates to the National Council of Provinces.

government, political representatives and legal academics. The JSC has the power to determine its own procedures but any decision taken by it must be supported by a simple majority of its members. The independence of the judiciary is enshrined in the Constitution and this is partly reflected by the fact that a judge enjoys security of tenure and may only be removed from office at the end of a two-stage process. This process is set out in s. 177 of the Constitution. The first stage involves an inquiry to ascertain if the judge is:

- Suffering from an incapacity;
- Grossly incompetent;
- Guilty of gross misconduct.

The second part of the process is that the National Assembly calls for the removal from office of the judge. This requires that the National Assembly passes a resolution which must be supported by a 2/3 majority. Once this is done, the President of South Africa must remove the judge from office.

A judge who is under investigation may also be suspended from office by the President on the advice of the JSC.

Matters of judicial discipline are governed by the *Judicial Service Commission Act 2008*. This Act established the Judicial Conduct Committee ("JCC") which comprises the Chief Justice, Deputy Chief Justice and four other judges, two of whom must be women. The JCC is empowered to accept and investigate complaints about judges provided that the complaints relate to matters which are set out in the Act and are submitted in accordance with the Act.

The 2008 Act imposes a number of obligations on judges. In summary, these are:

- Judges are prohibited from holding any other office of profit or to receive payment for any service;
- Judges must adhere to the Code of Judicial Conduct which, under the 2008 Act, 'shall serve as the prevailing standard of judicial conduct'.

- Judges must comply with the requirements of the 2008 Act in respect of declaring registrable interests.⁸⁸

A complaint against a judge may be made by any person but the JCC may only deal with complaints that fall within the scope of the Act. Any complaint that does not fit within the Act must be dismissed by the JCC. Complaints that are frivolous or vexatious or those which arise from decisions of the courts must also be dismissed. The 2008 Act sets out the grounds on which a complaint may be made. These are very broad and are:

- Incapacity, gross incompetence, or gross misconduct, as set out in s. 177 of the Constitution;
- Wilful or grossly negligent breach of the Code of Judicial Conduct;
- Accepting, holding or performing any office of profit or any form of remuneration other than their salary;
- Wilful or grossly negligent failure to comply with any directions imposed by the 1994 Act;
- Any other conduct that is *'incompatible with or unbecoming the holding of judicial office, including any conduct that is prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts'*.

The JCC investigates the complaint and at the conclusion of the investigation, it may dismiss the complaint or uphold it and impose remedial steps on the judge. If the JCC is satisfied that a complaint is serious enough to amount to impeachable conduct, as set out in s. 177 of the Constitution, it must recommend that a Tribunal be established to deal with it.

⁸⁸ This is covered in Ireland by the *Ethics in Public Office Act 1995* and by the *Standards in Public Office Act 2001*

Conclusion

The principle of judicial independence is a recurring theme in all the common law and mixed jurisdictions outlined. This is evident from provisions guaranteeing security of tenure and remuneration. It is also to be seen from the general reluctance in all jurisdictions to investigate matters which are more properly dealt with by way of an appeal against a judge's ruling.

Impeachment is relatively rarely used. This may be because it is a drastic measure and consequently only suitable for serious lapses of conduct or for incapacity. It is also arguable that a judge may well opt for resignation or retirement instead of going through the impeachment process. On the two occasions that impeachment was discussed in this jurisdiction, all three judges in question ultimately resigned from office.

The process for the impeachment of judges in Ireland is set out in *Bunreacht na hÉireann* albeit in a less detailed way than applies to the impeachment of a President. This is in sharp contrast to the impeachment process in other jurisdictions, notably the US where the process has been relatively frequently used and involves the trial of the person whose impeachment is sought.

Many jurisdictions have specific rules governing judicial misconduct that raises complaints but which would not be sufficiently grave to warrant impeachment. Ireland has a form of this but it applies only to judges of the District Court. The *Judicial Council Bill* is expected to provide a means of dealing with matters of judicial misconduct and complaints.

The Constitution of South Africa is one of the world's youngest constitutions and it contains detailed provisions on impeachment. It is supplemented by legislation which sets a standard of conduct to which all judges must adhere. Notably, the South African law imposes a

statutory obligation on judges to comply with rules on disclosure of registrable interests. In Ireland, this issue is governed by the *Ethics in Public Office Acts* but judges are not currently covered by those Acts.⁸⁹

⁸⁹ Judges are also exempt from the requirements of the Ethics Act if they hold a public office, other than judicial office. The question of whether this exemption can be relied upon in by the spouse/partner of a judge, who is required to disclose a registrable interest under the Acts, is not immediately apparent. The *Public Sector Standards Bill* is currently on the 'C' List of the Government's Legislative Programme. The stated purpose of the Bill is to '*reform the existing legislative framework in relation to ethics regulation for those in public office*' but it is not clear whether the Bill will have any impact on the judiciary.